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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHRIS BUTLER, Defendant and Appellant.	B242844 (Los Angeles County Super. Ct. No. BA390773)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne Egerton, Judge. Affirmed in part, reversed in part and remanded with directions.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Chris Butler of both theft and attempted theft from Joseph Shorr, an elder adult, as well as two counts of forgery. On appeal Butler contends the trial court should have instructed the jury sua sponte on the defenses of mistake-of-fact and claim-of-right. He also contends, because he acted pursuant to a single plan and with only one general intent to take money from the victim, he cannot be convicted of both theft and attempted theft. Finally, he challenges the order requiring him to reimburse the County of Los Angeles for his court-appointed attorney fees and investigative costs because no evidentiary hearing was held to determine his ability to pay those fees. We reverse the conviction for attempted theft from an elder adult victim and the fee award and remand the matter to permit the court to hold the required evidentiary hearing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Butler was charged in an amended information with theft from an elder adult (Pen. Code, § 368, subd. (d))[1] (count 1), attempted theft from an elder adult (§§ 664, 368, subd. (d)) (count 2) and two counts of forgery (§ 475, subd. (c)) (counts 3 and 4). The information specially alleged as to count 1 Butler took property of a value exceeding $65,000 (§ 12022.6, subd. (a)(1)).[2]

2. *Summary of Trial Evidence*

In May 2010 Butler began renting a guesthouse from Shorr, who was then 86 years old, after replying to an online advertisement posted on Shorr's behalf. Shorr's family friend and caretaker, Teresa Yasumi, and her boyfriend, Freddie Baca, lived in the

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[1] Statutory references are to the Penal Code.

[2] Section 12022.6, subdivision (a), provides in part, "When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] (1) If the loss exceeds sixty-five thousand dollars ($65,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year. . . ."

main house with Shorr. In July 2011 Shorr received $335,000 from a reverse mortgage on his home. He placed the funds in a new, interest-bearing checking account at Bank of America (called a "Maximizer account"), where he also maintained a regular checking account.

After opening the new account, Shorr suffered spinal injuries that led to two separate hospital visits and extended stays at a live-in rehabilitation center: the first from August 1, 2011 through September 3, 2011; the second from October 1, 2011 through November 4, 2011.

During this time 25 checks were drawn against Shorr's accounts payable to Butler. The checks were for varying amounts, ranging from $110 to $52,000 and were dated from August 1, 2011 to November 3, 2011. Together, they totaled more than $129,000. Some were drawn from Shorr's regular checking account; others from his Maximizer account. Several of the checks noted "construction" or "remodeling" on the memo lines. Shorr testified it was not his signature on any of the 25 checks and he did not authorize anyone to write the checks to Butler.

While in the rehabilitation center, Shorr authorized Baca to handle his finances and to pay his bills, but not to write checks to Butler. When Baca visited Shorr at the center, he brought Shorr's checkbook for Shorr to sign his name only to two or three checks at a time.

When Shorr returned home on November 4, 2011, all his personal belongings, including furniture, clothes and photo albums, were gone. His carpeting, bathroom tile and furniture had been replaced, and his living room repainted. According to Shorr, Butler told him, "I own your house and [I'm] the general manager." Shorr insisted he did not authorize any of the work at his home and he had not asked Butler to replace anything.

On November 7, 2011 Butler attempted to cash another check drawn on one of Shorr's Bank of America accounts—this one dated November 5, 2011 in the amount of $19,500. By this time, however, branch manager Christina Chung had placed a risk warning on Shorr's accounts because she could not reach him to discuss the increasing

amounts being taken from his accounts by non-customers. After the bank determined the signature on Butler's check did not match the one on record for Shorr, the teller refused to cash it.

The following day Shorr went to the same Bank of America branch to withdraw money and was met by Chung and assistant branch manager Sandy Osorio, who reviewed with him the checks written to Butler, including the $19,500 check from the previous day. Shorr told them he did not sign or authorize any of the checks.

When he was arrested on November 8, 2011, Butler had in his possession yet another check from Shorr's account written to Butler. This check was dated November 3, 2011 and was for $450.

Shorr's neighbor Mona Hobson testified she observed construction and renovation at Shorr's home from August through November 2011 and was concerned because Shorr "had always said he wanted nothing done to that house, that he was only taking a reverse mortgage so he would have enough money to live. . . . And so it was extremely unusual for him to have any work going on at the house."

Testifying in his own defense, Butler claimed he had Shorr's authorization to renovate the home and his consent to cash the checks to pay for the project. According to Butler, Baca started doing some work on the home at Shorr's request, including replacing flooring and carpeting and putting in new living room doors. When Baca was unable to finish the work, Shorr "asked me if I would get the work done for him because Freddie wasn't getting it done." "I would go out and I would take pictures of things and the prices and all this kind of stuff, and then show it to [Shorr], get his approval and then tell him how much it was going to cost, and then he would write me a check for that amount." Butler testified Shorr had agreed to pay him $5,000 for his services and proposed a budget of $108,000 for construction and remodeling. Butler hired a contractor and had up to 10 people a day working on the home on various projects, including installation of new windows, carpeting, painting and landscaping. He also bought furniture in advance so it would be ready once the interior was complete. Butler

denied writing Shorr's signature on the checks and testified Shorr himself had signed the checks. He also testified he saw Shorr write some of the checks himself.

3. *Jury Instructions, Verdict and Sentencing*

The trial court instructed the jury on theft by larceny pursuant to CALCRIM No. 1800 and possession of a completed check with intent to defraud, a type of forgery, pursuant to CALCRIM No. 1932. Butler did not request a mistake-of-fact or claim-of-right instruction, and neither was given.

The jury found Butler guilty on all four counts and found the special allegation true. Butler was sentenced to an aggregate state prison term of five years, consisting of the upper term of four years for theft from an elder adult plus one year for the excess value enhancement under section 12022.6, subdivision (a)(1), and a concurrent two-year term for one of the forgery counts. Sentences for attempted theft and the second forgery count were stayed pursuant to section 654. Butler was ordered to pay $129,275 plus 10 percent interest in restitution to the victim, $3,000 in county attorney fees for his appointed defense counsel and $500 in defense investigative costs.[3]

DISCUSSION

1. *The Trial Court Did Not Err in Failing To Instruct the Jury Sua Sponte on Mistake of Fact Pursuant to CALCRIM No. 3406*

The trial court must instruct the jury on all general principles of law necessary to properly perform its function: "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The trial court's sua sponte instructional duty includes the obligation to instruct the jury with any affirmative defense supported by substantial

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[3] In its oral pronouncement at sentencing the court ordered $500 in investigative costs; but the abstract of judgment incorrectly recorded the amount as $5,000.

evidence provided the defense is not inconsistent with the defendant's theory of the case. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *Breverman*, at p. 157.)

Butler contends his trial testimony provided substantial evidence he mistakenly believed he had Shorr's permission to withdraw the money from Shorr's account. Accordingly, Butler argues the court erred in failing to instruct the jury sua sponte with CALCRIM No. 3406, mistake of fact, which provides in part, "The defendant is not guilty of the [charged crime] if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact."[4]

An argument substantially identical to Butler's was rejected by the Supreme Court in *People v. Anderson* (2011) 51 Cal.4th 989, 997-998, which held trial courts have no duty to instruct sua sponte on a defense that serves only to negate the mental state element of the crime if the jury is otherwise properly instructed on the mental state required to commit the crime. The Court explained, """[W]hen a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given *sua sponte* and must be given only upon request."""" (*Id.* at pp. 996-997; see *People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

While *Anderson* involved the defense of accident, its reasoning was applied to the mistake-of-fact defense and "any other defense that operates only to negate the mental state element of the crime" in *People v. Lawson* (2013) 215 Cal.App.4th 108, 117. In

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[4] The evidentiary premise for Butler's contention is questionable. Although he testified Shorr had approved the remodeling expenditures, Butler did not claim he believed he was authorized to sign Shorr's names to checks or even that he mistakenly believed Shorr had signed them. To the contrary, Butler testified he actually saw Shorr sign checks that Butler thereafter cashed.

Lawson the defendant was found guilty of petty theft with priors for stealing a $20 hooded sweatshirt (a "hoodie") from a retail store. (*Id*. at p. 111.) On appeal he argued the jury could have reasonably inferred he simply forgot about the hoodie, which was draped on his shoulders as he paid for the other items and left the store. Accordingly, he contended the trial court should have instructed sua sponte on the defense of mistake of fact. (*Id*. at p. 118.) The Court of Appeal agreed the evidence supported a reasonable inference Lawson forgot about the hoodie. Because this defense amounted to no more than a claim he took the hoodie without intending to steal it and thus served only to negate the mental state required to commit the crime, however, the court found the theft by larceny instructions given—"'[w]hen the defendant took the property, he *intended* to deprive the owner of it permanently'"—sufficient to address such a defense. (*Ibid*., italics added.) "Like the defense of accident, an instruction on the defense of mistake of fact would have served only to negate the mental state element of the crime." "Thus, even if substantial evidence supported an instruction on mistake of fact, the trial court had no duty to instruct on the defense sua sponte." (*Ibid*.)

In light of *People v. Anderson, supra,* 51 Cal.4th 989, and *People v. Lawson, supra,* 215 Cal.App.4th 108, *People v. Russell* (2006) 144 Cal.App.4th 1415, upon which Butler relies, does not require a different result. *Russell* held the defendant was entitled to a sua sponte mistake-of-fact instruction based on evidence he believed the motorcycle he stole had been abandoned: "[I]nstructions on the applicable defenses would have been more valuable to the jury than instructions regarding the elements of the offense." (*Russell*, at p. 1433.) However, as the *Lawson* court observed, "[I]n the wake of *Anderson*, *Russell* is apparently no longer good law *to the extent it held the trial court had a duty to instruct sua sponte on the defense of mistake of fact.*" (*Lawson*, at p. 118.)

Here Butler's testimony at most amounted to no more than a claim that he took Shorr's money without intending to steal it. Butler testified Shorr had authorized the checks to pay for the construction and remodeling that Shorr requested or, at least, he mistakenly believed Shorr had authorized it. In either case, he argued, he lacked the intent to steal or defraud. Because such a defense serves only to negate the mental state

element of the crime and the jury was properly instructed on that element pursuant to CALCRIM No. 1800 for theft by larceny and CALCRIM No. 1932 for forgery the court did not have a sua sponte duty to instruct on the defense of mistake of fact.[5]

2. *The Trial Court Did Not Err in Failing To Instruct the Jury Sua Sponte on Claim of Right Pursuant to CALCRIM No. 1863*

Butler also contends his trial testimony provided substantial evidence he was owed money for the work he performed and, as a result, the court erred in failing to instruct the jury sua sponte with CALCRIM No. 1863, claim of right. That instruction provides in part, "If the defendant obtained property under a claim of right, he did not have the intent required for the crime of theft. The defendant obtained property under a claim of right if he believed in good faith that he had a right to the specific property or a specific amount of money, and he openly took it. . . . If you have a reasonable doubt about whether the defendant had the intent required for theft, you must find him not guilty of theft."

Butler's claim-of-right argument is doubly flawed. First, Butler testified Shorr agreed to pay him $5,000. Even if credited, that testimony does nothing to explain Butler's theft of more than $129,000. Second, a claim-of-right defense is not established where, as here, an employee unilaterally determines he is entitled to certain wages and, without authorization, appropriates the property of the employer in purported payment of such wages. (*People v. Holmes* (1970) 5 Cal.App.3d 21, 23-24; *People v. Proctor* (1959) 169 Cal.App.2d 269, 277; *People v. Ranney* (1932) 123 Cal.App. 403, 409; see § 511 [the unlawful retention of the property of another to offset or pay demands held against him is no defense to a charge of embezzlement].)

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[5] Any error in failing to give a mistake of fact instruction was, in any event, harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Russell, supra,* 144 Cal.App.4th at p. 1431.) By finding Butler guilty, the jury necessarily rejected his claim he believed in good faith that Shorr had consented to the taking of his money. It is not "reasonably probable" the mistake-of-fact instruction would have produced a more favorable result for Butler. (See *Watson,* at p. 836.)

3. *Butler's Separate Conviction for Attempted Grand Theft Violates the Bailey Doctrine*

In charging Butler the People elected to aggregate the 25 checks drawn against Shorr's account from August 1 through November 3, 2011 into a single felony count but to charge him with a separate felony, attempted theft from an elder adult, for his unsuccessful effort on November 7, 2011 to cash yet another check.[6] Relying on the principle enunciated in *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), Butler contends he committed only one theft-related offense, not two, because his acts involved a series of takings from the same individual pursuant to one continuing impulse, intent, plan or scheme. (See *id.* at p. 519.)

In *Bailey* the Supreme Court upheld the conviction of a woman charged with a single count of grand theft by false pretenses (at the time, a theft of more than $200) based upon multiple acts of petty theft—improper receipt of a series of welfare payments following her misrepresentation of the status of a man living in her home. (*Bailey*, *supra*, 55 Cal.2d at pp. 515-518.) Addressing the circumstances when multiple thefts of property or money are properly regarded as separate offenses, the Court held, "The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . . [W]here a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse and one plan, the offense is grand theft. [Citations.] [¶] Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Id.* at p. 519.)

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[6] It appears the People aggregated the multiple incidents of theft to qualify Butler for the one-year enhancement for thefts exceeding $65,000 under section 12022.6, subdivision (a)(1); the single largest check cashed by Butler was for $52,000.

Although *Bailey* itself dealt specifically with the aggregation of petty thefts into a single grand theft count, a number of appellate courts have understood the principle it articulated to apply equally to all theft charges and, as a result, have reversed multiple convictions for grand theft from a single victim when there was insufficient evidence the individual thefts, although factually distinct from each other, were committed pursuant to separate schemes or plans. (See, e.g., *People v. Packard* (1982) 131 Cal.App.3d 622, 626-627; *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149-1150; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363-364.)

Whether *Bailey* has been properly interpreted as propounding a uniform rule regarding the aggregation of any group of thefts or, instead, applies only to the aggregation of petty thefts to meet the threshold for a felony count of grand theft—that is, whether a defendant who repeatedly takes property exceeding the requisite amount for grand theft from a victim through separate transactions but pursuant to a single scheme or overarching misrepresentation commits more than one offense—is currently pending before the Supreme Court in *People v. Whitmer* (2013) 213 Cal.App.4th 122, review granted May 1, 2013, S208843. To determine the issue presented to us by Butler, however, we need not anticipate the Supreme Court's analysis of this broader question and decide whether Butler could have been charged with, and convicted of, separate theft counts for each individual check he cashed. Rather, because the People elected to aggregate into a single felony count Butler's theft from Shorr by cashing 25 checks over the course of three months, the question here is simply whether the attempt to cash yet another check several days later is separate and distinct from those 25 incidents or whether it should have been included as part of the aggravated felony count as part of the same indivisible scheme.

A similar issue was addressed in *People v. Tabb*, *supra*, 170 Cal.App.4th 1142, where the defendant was convicted of one count of grand theft of personal property for taking materials from his pipefitting job without permission and selling them to a recycling company for profit. The single grand theft count reflected an aggregation of petty thefts that took place between January 16, 2007 and April 4, 2007. The defendant

was also convicted of one count of petty theft with a prior for stealing additional property on April 4, 2007. (*Id*. at p. 1147.) The Court of Appeal reversed his conviction for petty theft with a prior, explaining, "It is misplaced to argue that the People may charge Tabb with both petty and grand theft by cumulating some, but not all, of the thefts." (*Id*. at p. 1150.) Under a *Bailey* analysis the court was "unable to ascertain evidence in the record that would permit a reasonable jury to conclude Tabb had a separate and distinct intent or plan on April 4, 2007, than on the other days he took [his employer's] property." (*Tabb*, at pp. 1150-1151.)

Similarly, there is no evidence in the record here that would permit a reasonable jury to conclude Butler had an intent or plan on November 7, 2011 that was separate or distinct from his scheme on the other days he stole Shorr's property. Contrary to the People's argument, it is of no moment that the November 7 attempted theft involved separate paperwork and documentation. The proper focus is on Butler's intent between August 1, 2011 and early November 2011. Nothing distinguishes the final check for $19,500 dated November 5 from the series of 25 earlier checks, which included one dated only two days before and were written for amounts both much lower ($110) and much higher ($52,000) than the November 5 check. Butler's attempt to withdraw funds on November 7, 2011 targeted the same account as several of the previous checks, Shorr's Maximizer account. He also attempted to cash the check in precisely the same manner as the others, going to the same Bank of America branch to deposit the check with a teller. Because there was no evidence Butler's November 7, 2011 attempted theft from Shorr was committed pursuant to a different scheme from the successful thefts included within count 1, this conviction must be reversed.

4. *The Trial Court Erred in Ordering Butler To Pay Attorney Fees and Investigative Costs Without Hearing Evidence Regarding His Ability To Pay*

Section 987.8, subdivision (b), "provides that, upon the conclusion of criminal proceedings in the trial court, the court may, after giving the defendant notice and a hearing, make a determination of his present ability to pay all or a portion of the cost of the legal assistance provided him." (*People v. Flores* (2003) 30 Cal.4th 1059, 1061.) As

defined in section 987.8, subdivision (g)(1), "legal assistance" includes "investigative services" and, as defined in subdivision (g)(2), "ability to pay" means "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. . . ." Subdivision (e) of the statute confirms the defendant's right to be heard in person, to present witnesses and documentary evidence and to confront any witnesses testifying about his ability to pay. Although the defendant's present ability to pay may be inferred from the content and conduct of the hearing (see *People v. Phillips* (1994) 25 Cal.App.4th 62, 71), whether express or implied the finding of ability to pay must be supported by substantial evidence. (See *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)[7]

As Butler contends and the People concede, in this case there was no hearing to determine Butler's ability to pay nor was there evidence otherwise in the record sufficient to support such a finding.[8] Accordingly, we remand for a hearing on his ability to pay in accordance with section 987.8.[9] (*People v. Flores*, *supra*, 30 Cal.4th at p. 1063 [remand is proper remedy when court orders defendant to pay attorney fees under § 987.8 without substantially complying with procedural safeguards enumerated in that section]; *People v. Verduzco* (2010) 210 Cal.App.4th 1406, 1421 [if the attorney fee award is in error,

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[7] There is a presumption that a defendant sentenced to prison does not have the ability to reimburse defense costs. Subdivision (g)(2)(B) of section 987.8 provides in part, "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense."

[8] Evidence regarding Butler's financial status prior to sentencing does not provide an accurate picture of his present ability to pay.

[9] Despite Butler's failure to object to the fee order at sentencing, unlike with booking fees, the right to appeal an order regarding attorney fees is not forfeited. (See *People v. McCullough* (2013) 56 Cal.4th 589, 593; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.)

remand is permissible for the purpose of determining whether the defendant has the ability to pay attorney fees].)

DISPOSITION

Butler's conviction in count 2 for attempted theft from an elder is reversed. The order to reimburse the County of Los Angeles for attorney fees and investigative costs is also reversed and the matter remanded for the trial court either to strike the award of attorney fees and investigative costs or to hold a hearing to determine Butler's ability to pay. In all other respects the judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.